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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 136

DANIELS & KENNEDY, INC.,

Petitioner,

against

A. S. JNGER,

Respondent.

PETITIONER'S REPLY BRIEF

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of the Bar

June 10, 1963

849 Press of Fremont Payne, Inc., 79 Washington St., N. Y.—Rector 2-0450

I

Inger argues that when the case was ready to go to verdict on both plaintiff's claim and the claim over D & K was obliged to surrender its identity and right to go to the jury on the claim over—D & K's second line of defense—in order to preserve its other right to go to the jury on plaintiff's claim against Inger—D & K's first line of defense.

But, Rule 14(a) explicitly guaranteed D & K full and unconditional possession and use of both rights on its own and not by Inger's grace or sufferance.

Clearly then the law did not invest Inger with dictatorial power to force D & K to forfeit, waive, surrender or diminish one valuable and substantial right to preserve the other.

When the jury found against plaintiff's claim the Court of Appeals and Judge Bruchhausen violated D & K's 7th Amendment and due process rights under Rule 14(a) by refusing to honor D & K's right to exoneration from liability. (See Petition pp. 24-33.)

Violation of these basic rights cannot be justified by these Courts likings for a settler or a settlement. (See e.g. *Wolff v. Lavorine, Inc.*, 17 A. D. 2d 213, Petition, pp. 55-56).

II

Unable to meet the petition's Point II, Inger attempts to dodge it by an argument which is seriously

pressed, on its face mandates summary reversal of the judgment without even the need for argument on certiorari.

Inger claims that D&K's workmanlike service warranty was breached because plaintiff, a D&K supervisory employee, was derelict in knowing that the beam jack was defective [and presumably in using it without halting work].* It expressly disclaims charging D&K with a breach on any ground that plaintiff was guilty of operational carelessness.

But, any issue as to plaintiff's (or for that matter anyone's) knowledge of a defect was finally and forever concluded by the jury's finding that there was, in fact, no defect in the jack when it found no unseaworthiness or negligence.

Thus, if it is being said that the Court of Appeals agreed with Inger's present contention that D&K was liable by virtue of plaintiff's supervisory misfeasance referrable to a defective jack, it is being said that the Court overstepped its permissible bounds by rejecting and redetermining the clear jury holding that the beam jack was not defective.

Any such appellate determination charging D&K with a breach of warranty referrable to a condition which the jury said never existed being posited directly on the rejection of a jury finding collides with the 7th Amendment and must fall.

Leaving fantasy and returning to fact, the jury's findings easily and properly harmonized with one another against the background of the pleadings, evidence and

* At the trial Inger expressly abjured reliance upon any claim that D & K was chargeable with any fault, failing, or knowledge referrable to the beam jack, other than through plaintiff himself. It argued that plaintiff's conduct, and that of no other D & K

charge, demonstrates that the jury found plaintiff's carelessness in his use of the non-defective jack was the sole cause of his accident. These same findings were made by Judge Abruzzo (Pet. 84, 85-86), and the Court of Appeals acknowledged that both fact triers had so found (Pet. 74).*

CONCLUSION

The petition for a writ of certiorari should be granted.

June 10, 1963.

Respectfully submitted,

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* Clearly any view of this case demonstrates conflict with *Dressner v. Pacific Dr. & Marine Equip. Inc.*, 5 Cir. ——, F. 2d ——, 31 LW 2575, 2576, since plaintiff's conduct was and is pressed as basis for D & K liability.